No. 968

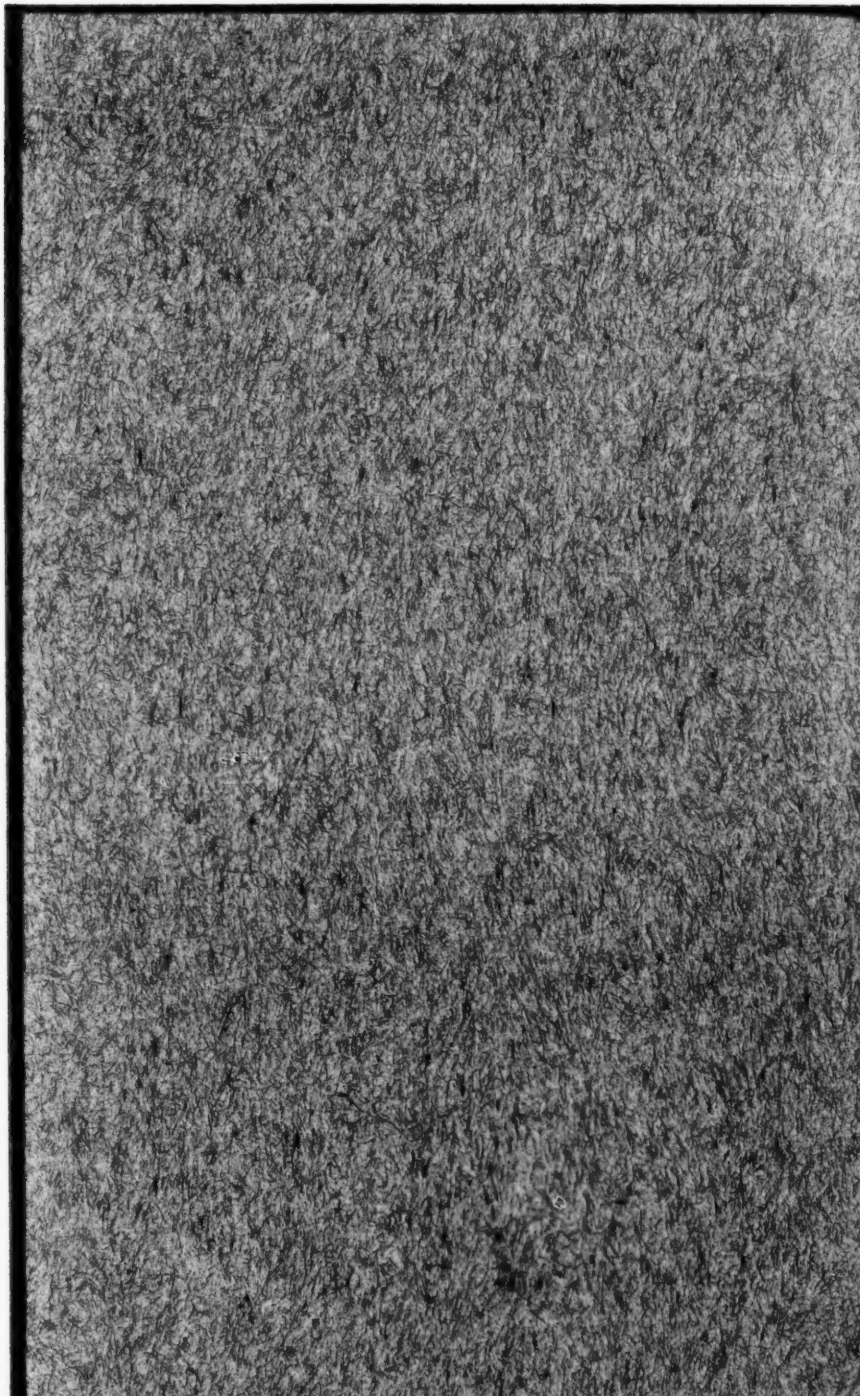
In the Supreme Court of the United States

October Term, 1938

[redacted]

[redacted]

[redacted]



INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	2
Statement	2
Argument	10
Conclusion	20
Appendix	21

CITATIONS

Cases:	
Commissioner v. *Smith*, 136 F. 2d 556	14
Geerday Enterprises v. *Commissioner*, 126 F. 2d 384	19
Gregory v. *Helvering*, 293 U. S. 465	12, 14
Griffiths v. *Commissioner*, 308 U. S. 355	14
Hellmich v. *Hellman*, 276 U. S. 233	16
Helvering v. *Credit Alliance Co.*, 316 U. S. 107	16
Higgins v. *Smith*, 308 U. S. 473	14
Insurance & Title Guarantee Co. v. *Commissioner*, 36 F. 2d 842, certiorari denied, 281 U. S. 748	15
Moline Properties v. *Commissioner*, 319 U. S. 436	14
Statutes:	
Internal Revenue Code, Sec. 862 (26 U. S. C. 862)	11
Revenue Act of 1936, c. 690, 49 Stat. 1648:	
Sec. 111	16, 21
Sec. 112	12, 14, 15, 16, 21
Sec. 115	16, 23
Sec. 119	12, 13, 15, 17, 18, 19, 24
Sec. 143	18, 19
Sec. 211	15, 18, 26
Sec. 212	15, 19, 27
Revenue Act of 1937, c. 815, 50 Stat. 813, Sec. 501	26
Miscellaneous:	
Convention between the United States of America and Canada concerning income taxation, 50 Stat. (Part 2) 1399 (1939-1 Cum. Bull. 147)	26
Treasury Regulations 94:	
Art. 119-1	18, 28
Art. 119-2	18
Art. 119-3	18
Art. 119-4	18
Art. 119-5	18

Miscellaneous—Continued.

	Page
Art. 119–6	18
Art. 119–7	18
Art. 119–8	18, 28
Art. 119–9	18
Art. 119–10	18
Art. 119–11	18
Art. 119–12	18
Art. 119–13	18
Art. 119–14	18

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 968

WILLIAM C. HAY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court of the United States (R. 53–76) is reported at 2 T. C. 460. The opinion of the Circuit Court of Appeals (R. 374–384) is reported at 145 F. 2d 1001.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 14, 1944 (R. 385), and a petition for rehearing was denied on January 3, 1945 (R. 415). The petition for a writ of certiorari was filed on February 21, 1945. The juris-

diction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether taxpayer realized a taxable gain upon the liquidation of William C. Hay, Ltd., a California corporation, in December, 1937.

2. Whether, in view of the scope of the pleadings, the Tax Court's consideration of the December 1937 liquidation prejudiced the taxpayer.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are contained in the Appendix, *infra,* pp. 21–28.

STATEMENT

The facts as found by the Tax Court (R. 54–63) may be summarized as follows:

Taxpayer was born in Canada in 1884 but, in 1911, left Canada and took up his residence in Los Angeles, California. In 1918 he became a naturalized citizen of the United States. (R. 54.)

Taxpayer was the sole stockholder of William C. Hay, Ltd., a California corporation, hereinafter referred to as Hay, Ltd. His stock cost him $32,500. (R. 55, 63.) The corporation was his personal corporation and represented the bulk of his wealth. Its assets, worth in excess of $2,000,000 in 1937, the tax year, were kept in a liquid condition. (R. 55.)

Over a period of years prior to 1937 taxpayer became very concerned over the trend of events in the United States, economically and politically, and developed an acute tax consciousness. Being confined to his bed frequently by reason of a lung condition which he had acquired in his youth, he became particularly alarmed over the death duties his estate would have to pay if he were to die a citizen or resident of this country. To meet the heavy estate taxes, taxpayer feared it would be necessary for Hay, Ltd. to declare dividends upon which, in taxpayer's view, his estate would be subjected to income tax. The combination of these two taxes, taxpayer thought, would probably wipe out the bulk of his estate. Consequently, by the beginning of 1936 taxpayer had decided to expatriate himself and resume his Canadian citizenship. Other considerations played a part in this determination, one of them being an unhappy domestic situation from which he desired escape. But taxpayer's desire to be free of estate taxes in this country was the primary reason for his expatriation. (R. 54–56.)

In the spring of 1936, taxpayer conferred in Los Angeles with one Thompson, an accountant who was an income tax specialist of Vancouver, British Columbia, and placed himself in the latter's hands with respect to working out the details of transferring his residence, citizenship, and property interests. Various places were suggested by

Thompson, one of them being Nassau, and in the fall of 1936 taxpayer made a visit to Nassau and decided to set up a home there. Thompson advised him to form a corporation wherever he decided to establish his residence, and consequently it was determined to organize a Nassau corporation. Nassau had no income tax and the death duties were negligible. A plan was worked out by taxpayer and Thompson whereby taxpayer was to form a corporation in Nassau, exchange his Hay, Ltd. stock in Nassau for all the shares of the Nassau corporation, and eventually have the Nassau corporation liquidate Hay, Ltd. None of these transactions was to take place until after taxpayer's expatriation. (R. 56.)

In 1936 taxpayer entered Canada and took up residence there. On June 17, 1937, he became a British subject and has remained a British subject at all times since that date. (R. 56–57.)

Shortly thereafter taxpayer proceeded to Los Angeles to wind up his personal affairs, and, on July 21, 1937, he left Los Angeles for Nassau. With Thompson, he arrived in Nassau on July 26, 1937, having in his possession all the stock of Hay, Ltd. Immediately upon arrival, taxpayer and Thompson contacted a Nassau attorney and requested him to proceed with the organization of a Nassau corporation. Taxpayer also acquired a lease on some living quarters for a period of one year. (R. 57.)

On August 2, 1937, before the new corporation was formed, illness in his family caused taxpayer to leave Nassau and go to Canada. Before leaving, he endorsed his Hay, Ltd. shares and appointed Thompson his attorney in fact, with instructions to deliver the shares to the new corporation upon receipt of its stock. Taxpayer remained in Canada from August 4, 1937, until the latter part of September, 1937. He then left Canada, stopping in New York for a few days, and arrived in Nassau about October 10, 1937. He remained in Nassau until the end of April, 1938, when he returned to Canada. (R. 57.)

The Nassau corporation was chartered in the Colony of the Bahamas on August 4, 1937, under the name of Colonial Trust Company, Ltd. On August 6, 1937, the Hay, Ltd. stock was transferred by taxpayer, through Thompson, to the Colonial Company in exchange for all of its stock. The assets of Hay, Ltd. consisted, at this time, of approximately $2,000,000 in cash in United States and Canadian banks, a few receivables, and some oil and real estate properties. The total stock of Colonial consisted of 5,000 shares of 100 pounds each, or a total of 500,000 pounds. The value of 500,000 pounds in United States dollars on August 6, 1937, was $2,491,583. (R. 57–58.) Taxpayer did not comply with Section 112 (i) of the Revenue Act of 1936 when he formed the Colonial Company in Nassau, and he did not advise the

Commissioner of the formation of the company before it was chartered and before leaving this country. (R. 63.)

After his return to Nassau in October, 1937, taxpayer decided to transfer the oil and real estate properties to a separate corporation under the management of his son, James, who was then about 26 years of age, to afford the latter some business experience (R. 58). About November 15, 1937 (R. 58, 63), taxpayer telephoned Thompson requesting him to have the attorneys of Hay, Ltd. in Los Angeles organize a California corporation for this purpose. Such a company was organized under the name of Beverly Oil Company on November 18, 1937, and the properties mentioned were transferred to it by Hay, Ltd. in exchange for its capital stock. During the telephone conversation referred to above, taxpayer requested Thompson to have the Hay, Ltd. attorneys prepare papers which could be used for the dissolution and liquidation of Hay, Ltd. When these papers had been prepared Thompson took them by plane from Los Angeles to Nassau. (R. 58.)

During the first week of November, 1937, taxpayer had as his guest in Nassau a New York economist, who called taxpayer's attention to discussions taking place in respect of proposed tax legislation to be enacted by Congress in 1938 taxing surpluses of American corporations, particularly holding companies. Taxpayer became

very much alarmed over such possibilities, and the question of liquidating Hay, Ltd. was discussed in Nassau during November. By November 27, 1937, taxpayer had decided to liquidate Hay, Ltd. Thompson was opposed to the liquidation in 1937, for he believed that this would result in tying together as one plan the August exchange of Hay, Ltd. shares and the subsequent liquidation. He considered that he had completed the job for which he had been engaged when the August exchange took place, for in his opinion that transaction had established the situs of taxpayer's wealth outside of the United States. (R. 59.)

The owners of the Hay, Ltd. stock (Colonial Trust Company, Ltd. and its secretary, the latter being the record holder of two shares of Hay, Ltd. stock) filed a written consent to the winding up and dissolution, as required by California law, and the board of directors, meeting in Nassau on December 3, 1937, authorized the winding up and dissolution, the taking of all necessary steps to that end, and the distribution of its assets. On December 10, 1937, a written instrument was executed in Nassau in the name of Hay, Ltd. by taxpayer, president, and the Nassau attorney, as assistant secretary, by which Hay, Ltd. conveyed to Colonial Trust Company, Ltd. all of its property. On that date, Hay, Ltd. had $1,190,859.74 in cash in Canadian banks and $875,400.33 in

United States banks. Its only other properties were the shares of Beverly Oil Company and 2,000 shares of Lancaster Process Company. Shortly after the liquidation, certificates for these shares were reissued in the name of Colonial, and these shares were still owned by Colonial at the time of the hearing herein. Checks for the cash in the aggregate amount of $2,066,260.07, were drawn to the order of the Colonial Trust Company, Ltd. and signed by taxpayer on December 10, 1937, while he was in Nassau. These were then mailed to the Bank of Nova Scotia in Montreal and deposited by that bank to the credit of Colonial Trust Company, Ltd. (R. 59–60.)

When taxpayer was in Montreal, Canada, in August and September, 1937, he opened two bank accounts with the Bank of Nova Scotia in that city in the name of Colonial Trust Company, Ltd. The first account, a Canadian dollar account, was opened on August 10, 1937, with a deposit of $80,000, which represented a loan by taxpayer to Colonial. The other was a United States dollar account and was opened on September 7, 1937, with a deposit of $50,000. On December 13, 1937, a total of $2,061,517.14 was deposited in this account, representing a portion of the checks drawn by Hay, Ltd., in liquidation, to Colonial. The balance of the liquidating cash distribution, $4,742.93, was deposited in the Canadian dollar account. Twelve other deposits aggregating $7,208.62 were

made in the United States dollar account during 1938 and 1939. (R. 60–61.)

Otherwise than as set forth herein, Colonial Trust Company, Ltd. has never engaged in any business since its formation. The only offices it had in Nassau were an office in the office of the Nassau attorney who assisted in the incorporation, and a room in an apartment that taxpayer maintained in Nassau while he was there. Colonial Trust Company, Ltd. has never had any paid employees. It has never had a bank account in any substantial amount in Nassau. All of its cash at the time of hearing herein was in Canada. Its minutes and other corporate documents are kept in taxpayer's home in Canada. Taxpayer has not been in Nassau since December, 1939. (R. 61.)

The Colonial Trust Trust Company, Ltd. was incorporated for the primary purpose of removing the situs of taxpayer's wealth from the United States with a view to avoiding estate taxes in the United States, and for the further purpose of accomplishing such removal in a manner that would produce no income tax liability. It had no business purpose. (R. 61–62.)

Since leaving the United States on July 26, 1937, taxpayer has not been in the United States for other than a temporary or transitory purpose. He has been a nonresident alien of the United States at all times since June 17, 1937. (R. 62.)

In his notice of deficiency and attached statement (R. 5–9), the Commissioner notified the taxpayer of a deficiency in his income tax. The proposed adjustment was explained, so far as here relevant, as follows (R. 8, 53–54):

> (b) Gain on disposition of capital stock of William C. Hay, Limited, is determined in the amount of $2,459,083.00. Inasmuch as the assets had been held for over ten years, 30 percent of that gain, $737,724.90, constitutes the portion thereof taxable as capital net gain under the provisions of sections 112 and 117 of the Revenue Act of 1936.

On these facts the Tax Court held that upon the liquidation of Hay, Ltd., in December, 1937, taxpayer realized gain from sources within the United States in the amount of the difference between the cost of his stock in the corporation and the value of its assets at the time of liquidation and, accordingly, that he was taxable on that gain (R. 64–73). The Tax Court also rejected the taxpayer's contention that the trial should be limited to a consideration of the events of August 6, 1937 (*supra*, p. 5), and that the liquidation of December 10 was not within its proper scope (R. 73–76). On appeal, the decision of the Tax Court was affirmed on both points (R. 374–384).

ARGUMENT

1. This case raises a question as to what tax effect is to be given to interlocutory steps in

pursuance of a tax avoidance scheme. Taxpayer was the sole stockholder of Hay, Ltd. and had acquired his stock at a cost of $32,500 (R. 55, 63). In 1937 the corporation had assets in excess of $2,000,000, including $2,000,000 in cash (R. 58). Becoming alarmed over the amount of estate and income tax his estate would be required to pay on this corporate property after his death, taxpayer, with the aid of a Canadian tax expert, worked out a plan to expatriate himself and transfer the property to Nassau in the Bahama Islands (R. 55–56). In order to accomplish his purposes it was necessary for him to rid himself of his stock in Hay, Ltd. since his estate would have been taxed on it upon his death even if he were a nonresident alien. Internal Revenue Code, Sec. 862 (a) (26 U. S. C. 862). However, if he were to rid himself of the stock by liquidating Hay, Ltd. he would be subjected to a large income tax. His plan (R. 56), therefore, was—

> to form a corporation in Nassau, exchange his Hay, Ltd., stock in Nassau for all the shares of the Nassau corporation, and eventually the Nassau corporation would liquidate Hay, Ltd. None of these transactions was to take place until after petitioner's expatriation.

Taxpayer executed this plan by securing his expatriation on June 17, 1937 (R. 56–57); chartering a Nassau corporation, Colonial Trust Company, Ltd., on August 4, 1937 (R. 57–58),

which had no business purpose (R. 61–62); transferring his Hay, Ltd. stock to Colonial Trust Company, Ltd. in exchange for all of its stock, on August 6, 1937, at Nassau (R. 58); and liquidating Hay, Ltd., on December 10, 1937, by transferring all of its assets to Colonial Trust Company, Ltd. (R. 59–60). Taxpayer now contends that this scheme, under which he used a foreign corporation as a mere "contrivance" to his above-described end (*Gregory* v. *Helvering*, 293 U. S. 465, 469), made his gain from the liquidation of Hay, Ltd., the California corporation, tax free.

The plan executed by taxpayer was one predicated principally upon Sections 112 (i) and 119 (e) of the Revenue Act of 1936 (Appendix, *infra*, pp. 22–23, 25). Under Section 112 (b) (5) and (i) (Appendix, *infra*, pp. 22–23) no gain would be recognizable from taxpayer's August, 1937, exchange of his Hay, Ltd. stock for all of the stock of Colonial Trust Company, Ltd., the Nassau corporation, if he established to the satisfaction of the Commissioner that the exchange was not in furtherance of a scheme for the avoidance of income taxes.[1]

[1] Section 112 (b) (5) provides that no gain shall be recognized when property is transferred to a corporation by a person in exchange for the stock of the corporation and immediately after the exchange such person is in control of the corporation. Section 112 (i), however, provides that a foreign corporation shall not be considered as a corporation under Section 112 (b) (5) unless it has been established to the satisfaction of the Commissioner that the exchange was not in pursuance of a plan for the avoidance of income taxes.

He did not attempt to do so. Hence, he argues that his gain was derived from this exchange, was recognizable because of his failure to satisfy the Commissioner that the exchange was not in furtherance of a scheme for tax avoidance, but that the gain was nontaxable under Section 119 (e) (Pet. 9–14). The latter Section provides, among other things, that gains, profits and income derived from the purchase of personal property within, and its sale, or exchange (Section 119 (f), Appendix, *infra*, p. 25), without the United States shall be treated as derived entirely from sources within the country in which sold or exchanged. As stated, taxpayer, as part of his plan, exchanged his Hay, Ltd. stock in Nassau for stock of the Nassau corporation. Thus, the gain to him would be derived from sources without the United States and nontaxable to him if, as he contends, the August exchange must be given effect as an isolated transaction. Both the Tax Court and the court below, however, correctly refused to give such effect to that exchange.

Contrary to taxpayer's repeated intimations (Pet. 9–12), the court below did not discriminate between United States citizens and nonresident aliens when it rejected his contention that his gain was derived from the August, 1937, exchange. The court simply applied the well-established rule that the existence of a corporation may be disregarded or ignored for tax purposes when it is

a sham set up for purposes of tax avoidance. *Higgins* v. *Smith*, 308 U. S. 473, 475–477; *Moline Properties* v. *Commissioner*, 319 U. S. 436, 439; *Commissioner* v. *Smith*, 136 F. 2d 556 (C. C. A. 2d); see also *Gregory* v. *Helvering*, 293 U. S. 465; *Griffiths* v. *Commissioner*, 308 U. S. 355, 357–358. The rule is clearly applicable here since, as the Tax Court found (R. 61–62), the Nassau corporation—

> was incorporated for the primary purpose of removing the situs of petitioner's wealth from the United States with a view to avoiding estate taxes in the United States, and for the further purpose of accomplishing such removal in a manner that would produce no income tax liability. It had no business purpose.

Accordingly, whatever the Nassau corporation did must be deemed to have been done by taxpayer. When he exchanged his Hay, Ltd. stock for the Nassau corporation stock, he made an exchange with himself which had no substantive effect; the transaction was a mere formality. The Commissioner was not bound to assess a tax on this transaction under Section 112 (i) and, in that way, aid in the consummation of taxpayer's plan for tax avoidance which Congress, in Section 112 (i) itself, intended to forestall. Thus when the Nassau corporation liquidated Hay, Ltd. the taxable effect was the same as if taxpayer himself had received the assets of the California corporation in liquida-

tion; the transaction resulted in the receipt by him of a large gain in the form of a liquidating dividend.[2]

Taxpayer is therefore liable for income tax on the gain he received from the liquidation of Hay, Ltd. if the gain was derived from sources within the United States (Section 212 (a), Appendix, *infra*, pp. 27–28).[3] Section 119 (Appendix, *infra*,

[2] Since the corporate existence of the Nassau corporation may be disregarded, there was no gain to taxpayer from the August, 1937, exchange of stock, either actual or otherwise, and taxpayer is incorrect in asserting (Pet. 16), as a reason for the granting of a writ of certiorari, that the Commissioner ignored a gain and that the court below introduced a new concept into the body of tax law by stating (R. 378) that taxpayer derived no actual profit from the August, 1937, exchange of stock. Nor is the decision below in conflict with *Insurance & Title Guarantee Co.* v. *Commissioner*, 36 F. 2d 842 (C. C. A. 2d), certiorari denied, 281 U. S. 748, as taxpayer asserts. That was simply a case in which the transaction was found not to fall within the exempting provisions applicable to reorganizations. Here the transaction does fall within those provisions and a gain is recognized under Section 112 (j) only to prevent tax avoidance.

[3] The case presents no question as to whether the gain was a fixed or determinable annual or periodical gain, profit or income within the meaning of Section 211 (a) (Appendix, *infra*, pp. 26–27). Nonresident alien individuals *not* engaged in trade or business in the United States are taxable only on such income, but subsection (b) of Section 211 (Appendix, *infra*, p. 27) provides that a nonresident alien is taxable without regard to subsection (a) if he is engaged in trade or business in the United States. Taxpayer does not (Pet. 14), and could not, contend that he was not engaged in trade or business in the United States during the taxable year. The

pp. 24–26) defines income from sources within and without, as well as from partly within and partly without, the United States. Dividends from domestic corporations are included under subsection (a) (2) (Appendix, *infra,* pp. 24–25) as from sources within the United States. But although liquidating dividends, to the extent that they are distributions of earnings and profits accumulated after February 28, 1913, come within the definition of a "dividend" contained in Section 115 (a) (Appendix, *infra,* p. 23), Section 115 (c) (Appendix, *infra,* pp. 23–24) provides that distributions in complete liquidation of a corporation shall be treated as in full payment in exchange for stock and that Sections 111 and 112 shall be applied in determining the recognizable gain. See *Hellmich* v. *Hellman,* 276 U. S. 233; *Helvering* v. *Credit Alliance Co.,* 316 U. S. 107, 110.

Taxpayer seeks to take advantage of this tax treatment of liquidating dividends, contending that the liquidation of Hay, Ltd. was a sale or exchange within the meaning of subsection (e) of

---

phrase "engaged in trade or business within the United States" is defined in subsection (b) to include "the performance of personal services within the United States at any time within the taxable year." Taxpayer received a salary of $10,500 for his services as president and treasurer of Hay, Ltd., the California corporation, during the first seven months of 1937, the taxable year. He also was a citizen of the United States until June 17, 1937, lived in California until sometime in May of 1937, and returned to California after his expatriation for approximately a month.

Section 119, which provides that the source of gain from personal property purchased within the United States and sold (which includes "exchanged" pursuant to subsection (f)) without the United States, as well as from personal property purchased outside the United States, and sold in the United States, shall be the country "in which sold". It is at once apparent that the liquidation alone does not satisfy this provision, for subsection (e) contemplates two separate transactions—the purchase and subsequent sale of the same property by one person, not a simultaneous purchase by one person and sale by another. Assuming that taxpayer's purchase of his Hay, Ltd. stock in this country and its subsequent "sale" to Hay, Ltd. in liquidation may be considered two transactions for the purposes of subsection (e), even though a liquidation is the unilateral act of a corporation, not a sale or exchange in the commonly accepted meaning of those terms, it does not follow that taxpayer "sold" his Hay, Ltd. stock outside the United States. He "sold" the stock to Hay, Ltd., a domestic corporation which was incorporated under the laws of California, was engaged in business in California, conducted all of its business in the United States, and had no outside agency. Hence he "sold" the stock in the United States, regardless of the country in which he surrendered the stock certificates or from what country they

were forwarded to Hay, Ltd. The United States was the country in which he "marketed" the stock—the controlling factor under the Treasury's interpretation of subsection (e). See Treasury Regulations 94, Article 119–8 (Appendix, *infra*, p. 28). In other words, Congress did not intend to provide that one liquidating dividend might have numerous sources, the number depending upon how many different stockholders there are and in how many different countries they surrender their stock. The provisions of Section 119 are concerned with actual source, not artificialities, and the Regulations give effect to that fact. See Treasury Regulations 94, Articles 119–1 to 119–14, inclusive, especially Article 119–1 (Appendix, *infra*, p. 28).

It is therefore not material here whether the gain taxpayer realized from the liquidation of Hay, Ltd. be deemed a gain from a sale or a dividend.[4] In either event its source was in the

[4] The court below stated that it could not "conclude that a distribution in liquidation may not be treated as a dividend derived from sources in the United States under § 119 (a) (2)" (R. 382). Contrary to taxpayer's assertions (Pet. 12–13, 18), this conclusion does not mean that Sections 143 (b) and 211 (a) must be interpreted as making all nonresident aliens not engaged in trade or business in this country taxable on liquidating dividends and the withholding at source provisions applicable to them. Section 143 (b) requires the withholding at source of dividends, etc., "or other fixed or determinable annual or periodical gains, profits, and income" of nonresident alien individuals. Under Section 211 (a), nonresident aliens not engaged in trade or business in the United States are taxed only on such income. The court below was not concerned with the interpretation of

United States. Cf. *Georday Enterprises* v. *Commissioner,* 126 F. 2d 384, 390 (C. C. A. 4th). And, if it be thought that neither the dividend nor sale of personal property provisions of Section 119 apply, it is uncontrovertible that the source of the gain was in fact in the United States, and that the taxpayer is properly taxable thereon.

2. Taxpayer also states that the issues framed by the pleadings before the Tax Court went only to the question whether he was taxable, under Section 212 (a), on the August, 1937, transaction (*supra,* p. 5); that the Tax Court should have refused to consider the December liquidation of Hay, Ltd.; and that "The framing of issues by written pleadings timely filed is of the essence of fair hearings." (Pet. 15; see also Pet. 16–17.) But, as the opinion below reveals (R. 384), taxpayer was not prejudiced by any deficiency in the pleadings.

Taxpayer's attorneys were notified nearly two months prior to the hearing before the Tax Court that the Commissioner would endeavor to show that, if the August transaction was not taxable, taxpayer received a taxable gain from the December liquidation (R. 140, 165, 196, 201, 274–275). After discussions as to the proper scope of the trial, the trial judge decided that the trial should cover both the August exchange and the December

---

these sections, for, as stated, the taxpayer was engaged in trade or business in the United States. Sections 143 (b) and 211 (a) plainly refer to ordinary dividends only, regardless of how the word dividends in Section 119 (a) (2) is interpreted.

liquidation and the hearing proceeded on that basis (R. 152–153). As the court below stated (R. 384):

> It clearly appears from the record that both transactions were examined in detail and that the taxpayer in fact had full opportunity to produce evidence with regard to both transactions.

Here, as in the Tax Court and the Circuit Court of Appeals (R. 384), taxpayer has made no attempt to show that any other testimony relating to the December transaction exists which, if adduced before the Tax Court, might have led to different findings of fact. Hence, there is no substance in taxpayer's complaint as to the pleadings or scope of the trial.

CONCLUSION

The decision below is correct and there is no conflict. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
ROBERT N. ANDERSON,
MELVA M. GRANEY,
Special Assistants to the Attorney General.

MARCH 1945.